

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

SHEBOYGAN AREA SCHOOL DISTRICT

Involving Certain Employees of

SHEBOYGAN AREA SCHOOL DISTRICT

Case 13

No. 54327 ME-847

Decision No. 10488-A

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by Mr. Paul C. Hemmer, 605 North 8th Street, Sheboygan, Wisconsin 53082, appearing on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER CLARIFYING BARGAINING UNIT

The Sheboygan Area School District filed a petition on July 30, 1996 with the Wisconsin Employment Relations Commission requesting that the position of Secretary-Grade 7 in the Department of Personnel Services be excluded from an existing bargaining unit represented by Local 1750, AFSCME, AFL-CIO. A hearing on the petition was conducted in Sheboygan, Wisconsin on October 17, 1996 before Examiner Christopher Honeyman. A transcript of the proceedings was prepared, briefs were received from both parties and the record was closed by December 3, 1996. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. The Sheboygan Area School District, herein the District, is a municipal employer with offices at 830 Virginia Avenue, Sheboygan, Wisconsin 53081. The District bargains contracts with six bargaining units consisting of more than 1,000 employees.

2. Wisconsin Council 40, AFSCME, AFL-CIO and its Local 1750, herein the Union, is a labor organization with offices at 1207 Main Avenue, Sheboygan, Wisconsin 53083.

No. 10488-A

3. On July 30, 1996, the District filed a unit clarification petition with the Commission requesting that the Secretary-Grade 7 in the Department of Personnel Services be excluded as a confidential employe from the bargaining unit represented by Local 1750. That bargaining unit is described in the parties' 1996-1999 contract as:

office secretarial and clerical employees in accordance with the provisions of Section 111.70 of the Wisconsin Statutes, excluding all professional, supervisory, confidential, maintenance, custodial employees, student secretaries, seasonal secretaries, teacher aides, and para-professionals.

4. In 1994, the three positions in the Personnel Department became four positions with the addition of a Grade 6 Secretary. The Grade 6 Secretary was the only employe in the Department who was in the Union bargaining unit. The other positions were the Personnel Director, a Personnel Assistant, and an Executive Secretary. In February, 1996, the position of Personnel Assistant was eliminated by School Board action effective July 1, 1996. In the ensuing months, the Personnel Director and staff arranged to divide the work of the Personnel Assistant among those positions which would remain. In mid-June, 1996, the Secretary 6 position was posted with new duties at Grade 7. Three candidates applied for the position, one of whom was the incumbent, Shirley Aschebrock. Aschebrock was not selected and the position was given to Berta Swoveland. A grievance concerning the assignment was resolved when Aschebrock accepted a different position.

5. Swoveland became the Secretary-Grade 7 in the Personnel Department effective July 11, 1996. For the ensuing two weeks, the Personnel Director, Joseph Sheehan, attempted to provide work for Swoveland which was exclusively non-confidential in nature, and thereafter ceased doing so because it was interfering with the Department's work. Sheehan then began assigning Swoveland duties previously assigned to the Personnel Assistant or Executive Secretary, which involved confidential information relating to labor relations. Swoveland has access to all files in the Department, and is informed of the passwords for computer access to both the Personnel Director's files and the Executive Secretary's files on their networked computers. Aschebrock had not been informed of Sheehan's computer password. Aschebrock did have the same access to physical files that Swoveland has, but was not assigned to work with confidential files. Mail marked as confidential is opened by Swoveland, but was not opened by the predecessor Secretary-Grade 6.

6. The daily manner of operation of the Personnel Department since about July 25, 1996 has involved the routine assignment of filing, typing and telephone contacts relating to confidential labor relations matters interchangeably between the Executive Secretary and Swoveland. Aschebrock was infrequently assigned these duties. Swoveland thus has contact with

confidential labor relations material which previously would have been seen only by the Personnel Director, Personnel Assistant or Executive Secretary positions.

There has been some reduction of the volume of confidential material prepared for labor negotiations in recent years, because most of the labor organizations which have collective bargaining agreements with the District have engaged in interest-based negotiations with the District, in which fewer matters are treated as confidential. Nonetheless, the six bargaining units covering more than 1,000 employees generate sufficient confidential labor relations work to warrant exclusion of two Personnel Department clerical employees from municipal employee status.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

#### CONCLUSION OF LAW

The occupant of the position of Secretary-Grade 7 in the Department of Personnel Services, Berta Swoveland, is a confidential employee within the meaning of Section 111.70(1)(i), Stats., and therefore is not a municipal employee within the meaning of Section 111.70(1)(i), Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

#### ORDER CLARIFYING BARGAINING UNIT 1/

The occupant of the position of Secretary-Grade 7 in the Department of Personnel Services of the Sheboygan Area School District, currently Berta Swoveland, is hereby excluded from the bargaining unit described in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin,  
this 28th day of February, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/  
James R. Meier, Chairperson

A. Henry Hempe /s/  
A. Henry Hempe, Commissioner

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1/ Footnote found on pages 4 and 5.

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- 1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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1/ (Continued)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

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(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

Sheboygan Area School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT

Positions of the Parties

The District contends that the history of employment in the Personnel Services Department demonstrates that it is entirely reasonable that the position at issue function as a confidential employe. The District notes that up until two and one-half years ago, all positions within that Department were exempt from bargaining unit status, and that the original position of Personnel Department Secretary was an addition to the Department primarily created to resolve problems between the employe involved and a supervisor elsewhere. The District contends that when in 1996 the Board eliminated one of the non-unit Department positions, Personnel Director Sheehan attempted to function thereafter with the new Personnel Secretary as a non-confidential employe, but discovered within two weeks that this approach now resulted in delays of service and unnecessary extra work for all concerned. He then began to assign confidential work to that position. The District argues that this demonstrates both its good faith and the fact that it is unworkable to have a non-confidential employe in a setting in which a variety of confidential labor relations duties are being performed at any given time. The District further contends that both the physical layout of the office and Sheehan's regular work outside of the office support its contention that the office will not function well unless the remaining two employes are able fully to share in all confidential duties.

The Union contends that the exposure of the Secretary to confidential matters that relate to labor relations has not changed significantly and is de minimis. The Union argues that since there is another employe available to handle confidential matters and since there is evidence in the record that consensus-based collective bargaining is now the predominant mode at this place of employment, it is unjustifiable to exclude another position from the bargaining unit. The Union further argues that little evidence of actual confidential labor relations-related work by the incumbent is visible in the record. The Union contends that the access to confidential files of the new Secretary is no greater than that of the previous Secretary, and that it would be possible for Sheehan to block access by Swoveland to his computer password if he chose. The Union further contends that in Marshfield Joint School District 2/ the Commission stated that the physical proximity of confidential and non-confidential employes does not affect the status of such employes. The Union also argues that the only example given of supposedly confidential work by Swoveland to date was typing of a mediated grievance settlement, and that this example on its face was not confidential work, because both parties were privy to the contents of the settlement.

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2/ Decision No. 14575-A (WERC, 7/76).

## Discussion

It is well settled that for any employee to be considered confidential, the employee must have access to, knowledge of, or participation in confidential matters relating to labor relations. For information to be confidential, it must: a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and b) be information which is not available to the bargaining representative or its agents. 3/

In this case, the actual evidence of confidential labor relations-related work performed by the employee at issue is limited. The Union correctly notes that the typing of the grievance settlement document was not confidential work because the Union had access thereto and that some of the other work cited specifically by the District is confidential only in a general privacy sense, rather than in the labor relations context. Further supporting the Union's view is its argument that the volume of confidential work which needs to be performed in a given round of collective bargaining is significantly less now that the parties are engaging in consensus-based bargaining, now the predominant mode at the Sheboygan Area School District with its six bargaining relationships.

However, other factors should also be considered. First, the three month period between the date the District added confidential duties to the position in question and the date of hearing did not include much of the Department's labor-contract bargaining "season". Second, Sheehan's testimony that the Department will not function well with its reduced staff unless a free exchange of confidential labor relations work exists between the two secretaries is both credible on its face and supported by the history of that Department up to 1994, when no bargaining unit employees were present in a three person department. 4/ Third, a consensus bargaining relationship does not obviate the need for internal, confidential communications within the administration or, for that matter, within the Union. While consensus bargaining is supposed to eliminate "hidden agendas" of each

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3/ Milwaukee VTAE, Decision No. 8736-B (WERC, 6/79).

4/ While the Union notes that part-time non-confidential employees have been used to prepare the staff directory within that department, we do not infer from that evidence that these employees were given access to confidential data. There is no evidence in the record to support such a conclusion.



side (or, for that matter, the apparently positional "controlled scripting" described by the employer), a bargaining participant is still entitled to confidentiality in some circumstances, as for instance when expressing bargaining apprehensions in the privacy of their own team caucus.

Moreover, consensus bargaining rarely abolishes a contractual grievance procedure, and grievance processing continues to be a necessary task for both parties that requires the assistance of confidential personnel.

There is thus something to support each party's position in this matter. On balance, we conclude that the District's view is better supported based on two additional factors. One is that the testimony in the record demonstrates that the Personnel Director performs much of his work outside of the Personnel Department office. This supports the District's argument that over time it will be difficult for work of a confidential labor relations nature to be handled only by one Secretary. The other factor is the sheer number of employees supported by this Department. Here, the Personnel Department is involved with more than 1,000 represented employees in six units. We are satisfied that this number of employees/units will generate enough confidential labor relations work to support two confidential clerical employees in the Personnel Department.

Based on the foregoing, we find that the Secretary-Grade 7 in the Department of Personnel Services should be excluded from the unit as a confidential employee.

Dated at Madison, Wisconsin, this 28th day of February, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/  
James R. Meier, Chairperson

A. Henry Hempe /s/  
A. Henry Hempe, Commissioner